

It was undisputed the claimant suffered an injury to his right knee while working for respondent on June 7, 2006. Claimant argued that as a natural and probable consequence of that accidental injury he also suffered permanent impairment to his left leg and hip. Accordingly, claimant further argued that he has suffered a K.S.A. 44-510e whole person work disability. In contrast, respondent argued that claimant should be limited to a K.S.A. 44-510d scheduled disability to the right leg and that any additional disability

claimant may have suffered was caused by intervening accidents suffered after he voluntarily left work for respondent.

The Administrative Law Judge (ALJ) determined claimant's right knee symptoms persisted after treatment and the additional impairment to his left knee and hip were the natural and probable consequence of the June 7, 2006 work-related accidental injury. The ALJ further determined claimant suffered a 74 percent work disability based upon a 100 percent wage loss and a 48 percent task loss.

Respondent requests review and argues claimant should be limited to compensation for a K.S.A. 44-510d scheduled disability to the right knee. Respondent further argues that any additional disability claimant may have suffered to his left knee and hip were caused by separate and intervening accidents with subsequent employers. In the alternative, respondent argues that claimant is not entitled to a work disability because after treatment for his right knee injury he returned to work without restrictions and then voluntarily terminated his employment with respondent.

Claimant argues the ALJ's Award should be affirmed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent on October 24, 1994. At the time of his accident he was working as a gantry operator in the distribution center. Claimant testified that on June 7, 2006, he was working his way through the tires that had fallen off the conveyor belt when his foot got caught between the tires and he fell twisting his right knee. When he got up and took a step his right knee buckled.

Claimant was examined by the plant physician and then referred to Dr. Kenneth E. Teter, board certified orthopedic surgeon, who examined claimant on June 29, 2006, relative to his right knee injury. At that time, Dr. Teter recommended an MRI. The MRI performed on July 18, 2006, revealed a complete ACL tear with no detectable meniscal pathology. On August 22, 2006, Dr. Teter performed an arthroscopically assisted ACL reconstruction using the middle third of the patella tendon. Claimant returned for a post-op follow-up appointment on August 29, 2006, and was released to sedentary work at that time. Consequently, claimant returned to light-duty work within 10 days after surgery.

On September 19, 2006, Dr. Teter examined claimant's range of motion and the doctor determined claimant had full extension and flexion to 110 degrees. The doctor placed restrictions on claimant of no bending, squatting, twisting, pulling and pushing greater than 20 pounds. Claimant was limited to standing or walking two hours per shift

and a total lifting limit of 10 pounds. On October 17, 2006, Dr. Teter released claimant to return to full-duty work without restrictions. But Dr. Teter agreed that claimant would have to find his own limits regarding what his right knee would tolerate and if something caused knee pain then claimant should not do that activity.<sup>1</sup> And Dr. Teter noted that it would not be unusual for claimant to have pain and problems with captive positioning of the knee as well as prolonged standing and walking for the first 12 months after his surgery.

Due to a strike at respondent's plant claimant did not immediately return to his job but after the strike was resolved claimant returned to his regular job in January 2007. But because he was afraid he would re-injure his knee the claimant bid for and received a job driving a forklift. Claimant thought that job would be better for his knee but he experienced pain in his right knee due to being in a sitting position with a bent knee.

Claimant advised Dr. Teter that he was having mild aching anteriorly around the knee at the December 12, 2006 office visit. The doctor recommended that claimant be more aggressive in conditioning and strengthening. On March 12, 2007, claimant was again seen by Dr. Teter due to complaints of stiffness and pain over the anterior aspect of the knee near where the patella tendon was harvested for the ACL reconstruction. At the time of claimant's last examination with Dr. Teter on March 12, 2007, claimant complained that his right knee was still stiff, causing pain and swelling. Although claimant bid off to a forklift job thinking that it would be better for his knee, the constant bending of the knee and using the accelerator on the forklift caused pain. Dr. Teeter again suggested that claimant exercise and be more active. Claimant started using his left leg more in order to protect the right knee while going up stairs. Based on the AMA *Guides*<sup>2</sup>, Dr. Teter rated claimant's right lower extremity impairment at 4 percent due to ongoing tendonitis as well as the ACL reconstruction. At his deposition Dr. Teter reviewed the list of claimant's former work tasks prepared by Mr. Santner and concluded claimant could perform all of the tasks.

Ultimately, claimant resigned from his position on June 13, 2007.

Q. And resigned your position at Goodyear?

A. Yes.

Q. And why?

A. Well, I just -- my leg was swollen up all the time on the forklift. I didn't want to go back standing on the concrete running in between these tires with this much

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<sup>1</sup> Teter Depo. at 47.

<sup>2</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

space. I just couldn't see -- it wasn't worth it at that time. I decided am I, you know, I -- it just hurt too bad and it wasn't worth it to stay there.

Q. Describe as best you can the condition of your knee at the point that you decided to leave Goodyear.

A. Well, I would get home and my leg and my knee would be swollen up. I mean, I'd go over and show them and they'd say that's normal, it's not a problem, like my ankle, my calf, I mean, it would just be almost one solid thing. My knee was swole [sic] up all the time.<sup>3</sup>

When claimant resigned from his job with respondent he agreed he did not have any left knee or hip pain. At claimant's attorney's request, Dr. Koprivica examined and evaluated claimant on June 20, 2007. Dr. Koprivica opined claimant had torn his ACL and then had problems related to the surgical use of a patellar tendon graft with tendonitis of the patellar tendon and patellofemoral with anterior knee pain.<sup>4</sup>

Q. Following the surgery, and at that time of your examination of Mr. Killough, what residuals was he experiencing that you associated with the patellar -- strike that -- the ACL repair using the patellar tendon?

A. He was having pain in the anterior part of his knee, and he was having pain involving the patellar tendon which caused him to have pain in the front part of his knee, brought problems with captive sitting, swelling that he would get in that area of a patellar tendon where it was grafted, and it contributed to his limping also.<sup>5</sup>

Dr. Koprivica opined that claimant's complaints were medically consistent with swelling and knee pain due to the biomechanical loading of the leg on hard surfaces. He further opined that standing and squatting would be difficult for claimant to perform. Dr. Koprivica recommended claimant exercise on a stationary bike and use anti-inflammatory medications.

After resigning from his job with respondent, claimant became employed as an installation tech for approximately three months with Blue Sky Satellite. Claimant testified that he did not have any complaints relative to his left knee or left hip at the time he was examined by Dr. Koprivica or when he began working for Blue Sky. He testified the job with Blue Sky didn't work out because he was having to use a ladder to get on and off roofs which meant transferring his weight to his left knee as he went up the ladder leading with

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<sup>3</sup> R.H. Trans. at 12.

<sup>4</sup> Koprivica Depo. at 6-7.

<sup>5</sup> *Id.* at 7.

his left leg one step at a time. About the time claimant was leaving his job with Blue Sky in September 2007 he began to experience pain in his left knee and hip.

As a result of a court order claimant was examined and evaluated by Dr. Peter V. Bieri on November 26, 2007. In his report dated November 26, 2007, Dr. Bieri noted:

The claimant complains of persistent anterior knee pain, along with occasional posterior instability. He has difficulty climbing and descending stairs, and is reluctant to bend his knee, kneel, or squat. He complains of persistent swelling in the right knee, along the lateral aspect. The claimant stated that following his surgical intervention during rehabilitation that he developed compensatory pain in his left knee and left hip. This appears to be mechanical in nature, and secondary to gait abnormality at that time.<sup>6</sup>

But Dr. Bieri concluded claimant's left knee and hip did not meet the criteria for any additional impairment at the time he examined claimant. Dr. Bieri did provide a 17 percent rating for claimant's right lower extremity. Dr. Bieri also imposed permanent restrictions that claimant should refrain from repetitive climbing and descending ladders greater than three steps, and limit climbing and descending stairs to no more than one flight during work activity. Claimant is precluded from crawling as well as kneeling and squatting should be performed no more than occasionally.

On November 26, 2007, claimant started working for Overhead Door. His job as a door installer required him to install garage doors. Claimant noticed that his left leg and hip was hurting more. Claimant injured his left knee on March 19, 2008, while working for Overhead Door and has filed a claim. The last day he worked for Overhead Door was March 24, 2008. Claimant was terminated on March 25, 2008. At the time he was terminated, claimant was earning \$12 an hour.

On April 8, 2008, Dr. Koprivica again performed a medical examination of claimant and opined that claimant's left lower extremity impairment was due to the abnormal gait and compensatory overuse of the left lower extremity which was a direct and natural consequence of his protective behavior of the right lower extremity. Based upon the *AMA Guides*, the doctor concluded claimant had a 25 percent right lower extremity impairment due to severe cruciate ligament laxity plus an additional 5 percent due to patellofemoral pain. These right lower extremity impairments combine for a total of 29 percent. Dr. Koprivica rated claimant's left lower extremity at 7 percent due to chronic trochanteric bursitis of the left hip with abnormal gait plus an additional 5 percent for anterior knee pain and patellofemoral arthralgia. The left lower extremity impairments combine for a 12 percent functional impairment which is attributable to the June 7, 2006 work-related injury. Using the combined values chart, the hip and bilateral knee impairments combine for a 16 percent whole person impairment. The doctor imposed permanent restrictions that

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<sup>6</sup> Dr. Bieri's IME report dated November 26, 2007 at 4.

claimant should avoid prolonged activities on hard surfaces, avoid captive sitting, squatting, crawling, kneeling as well as limited climbing. Dr. Koprivica reviewed the list of claimant's former work tasks prepared by Mr. Richard Santner and concluded claimant could no longer perform 13 of the 27 tasks.

Dr. Eden Wheeler, board certified in physical medicine and rehabilitation, examined and evaluated claimant on June 24, 2008. At the time of the examination, Dr. Wheeler did not notice any abnormality in claimant's gait. Dr. Wheeler concurred with Dr. Teter's rating and restrictions. The doctor opined:

Q. And if you would, explain your specific conclusion regarding whether the left knee or left hip problems were a direct and natural consequence of the June 7, 2006 accident.

A. I didn't feel that medical evidence established a direct causal relationship between the symptoms and his work injury at Goodyear from I believe June of 2006. In my review of records, the first time Mr. Killough actually complained of left-sided symptoms was with Dr. Koprivica in April of 2008.

I do comment that there is some discussion of left-sided symptoms with Dr. Bieri in November of 2007 but at least my reading of his records was that he was having left-sided symptoms during his immediate postoperative period for the right knee when he was undergoing his therapy treatment.

Dr. Bieri's examination comments that he has no tenderness to palpation over the left knee or hip, that he has normal range of motion and normal gait. So based upon those issues, I did not feel that a direct relationship had been established between his left-sided symptoms and his Goodyear incident.<sup>7</sup>

Dr. Wheeler reviewed the list of claimant's former work tasks prepared by Mr. Santner and concluded claimant could perform all of the tasks.

Dr. Danny M. Gurba performed a court ordered independent medical examination of claimant. The doctor took claimant's medical history and diagnosed claimant as having trochanteric tendonitis in the left hip which was caused by overuse. Dr. Gurba concluded that claimant's left sided complaints were the result of claimant's activities after he left his employment with respondent. But the doctor ultimately concluded claimant suffered the overuse syndrome to the left side from protecting his right knee. Dr. Gurba testified:

Q. So the duties that he performed at Overhead Door that he described then created the trochanteric -- well, you --

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<sup>7</sup> Wheeler Depo. at 54.

A. Trochanteric tendonitis or bursitis, it's the same thing. And the patellofemoral pain, they both go together. And clearly the activities were associated with it.

But the question is: If it were only the activity and not protecting the other leg, why didn't he get it on both sides?<sup>8</sup>

Q. Okay. But when you start doing the activities that he describes at Blue Sky climbing the ladders, and Overhead Door where it's even more intense, then he gets the problems on the left side.

A. I think we're saying exactly the same thing. I agree with you 100 percent. But would he have had that happened [sic] if he weren't protecting his right knee?

Q. I understand.

A. My opinion is: No.<sup>9</sup>

Dr. Gurba adopted Dr. Koprivica's ratings for claimant's left knee and hip and noted that the ratings related to the original injury claimant suffered in June of 2006 while working for respondent.

Respondent's primary argument is that claimant was treated for his right knee injury and released to return to work without restrictions. Because he did not develop left knee and hip pain until he began subsequent employment, respondent further argues that his left knee and hip problems are the result of intervening accidents.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.<sup>10</sup> The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.<sup>11</sup> An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.<sup>12</sup>

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<sup>8</sup> Gurba Depo. at 43.

<sup>9</sup> *Id.* at 48-49.

<sup>10</sup> *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

<sup>11</sup> *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

<sup>12</sup> *Nance v. Harvey County*, 263 Kan. 542, 549, 952 P.2d 411 (1997).

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,<sup>13</sup> the court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*,<sup>14</sup> the court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*,<sup>15</sup> the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*,<sup>16</sup> the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury,

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<sup>13</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

<sup>14</sup> *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

<sup>15</sup> *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

<sup>16</sup> *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, rev. denied 231 Kan. 800 (1982).



which was “a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back.”<sup>17</sup>

In *Logsdon*,<sup>18</sup> the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

Whether an injury is a natural and probable result of previous injuries is generally a fact question.

When a primary injury under the Worker’s Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

When a claimant’s prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

In *Casco*,<sup>19</sup> the Kansas Supreme Court stated: “When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury.”

The claimant consistently complained of ongoing right knee pain and swelling as he continued working for respondent. The treating physician, Dr. Teter, agreed that claimant would continue to experience problems for up to a year after his surgery. As claimant protected his right knee he began to experience pain in his left knee and hip. Drs. Koprivica and Gurba concluded this led to overuse syndrome in claimant’s left hip and knee which was a natural consequence of his right knee injury. Claimant has met his burden of proof to establish that his injuries to his left knee and left hip were the natural and probable consequence of the right knee injury suffered during his employment with respondent. The Board affirms the ALJ’s finding in this respect.

Respondent next argues that because claimant voluntarily resigned from his job paying the same wage as his pre-injury wage, he is not entitled to a work disability.

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<sup>17</sup> *Id.* at 728.

<sup>18</sup> *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

<sup>19</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

Because claimant's injuries comprise more than a "scheduled" injury as listed in K.S.A. 44-510d, his entitlement to permanent disability benefits is governed by K.S.A. 44-510e(a), which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

This claim was submitted to the ALJ before the Kansas Supreme Court's *Bergstrom*<sup>20</sup> decision, which abrogated the good faith requirement for work disability. Consequently, the Board's analysis must change to conform to the current state of the law. The test is no longer whether claimant made a good faith effort post-injury to retain his employment with respondent and to find appropriate employment after his termination by respondent. Instead, the Supreme Court in *Bergstrom* said that the factfinder should follow and apply the plain language of the statute. Because claimant's injuries are not covered by the schedule of injuries in K.S.A. 44-510d, his compensation is set out in K.S.A. 44-510e. It provides that once an injured worker is no longer earning 90 percent or more of his preinjury average weekly wage, then the measure of disability is the percentage of task loss averaged with the percentage of wage loss.

As noted, respondent argues that the only reason claimant is no longer earning 90 percent of his preinjury average weekly wage is because he voluntarily resigned his position. The Board is mindful of the potential for claiming inequitable results when applying the literal language of the statute, but respondent's argument in this regard is for the Legislature, not the courts. Moreover, in this instance the claimant resigned because

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<sup>20</sup> *Bergstrom*, \_\_\_\_ Kan. \_\_\_\_, 214 P.3d 676 (2009).

his right knee continued to swell and cause him pain. Stated another way, he was unable to continue his employment because of the knee injury.

The Board affirms the ALJ's finding that claimant's injury resulted in a 12 percent permanent impairment of function to the body as a whole. Following his resignation, claimant obtained a job with Blue Sky and then with Overhead Door. When he found the other work, it was not at 90 percent or more of the gross average weekly wage he was earning with respondent at the time of his injury. Therefore, his permanent partial disability is not limited to his percentage of functional impairment. Instead, it is determined by averaging his task loss with his wage loss. The ALJ adopted Dr. Koprivica's 48 percent task loss opinion. The Board agrees and affirms. At the time of the regular hearing in this matter the claimant was unemployed. Consequently, he has a 100 percent wage loss. Averaging this wage loss with his task loss computes to a work disability of 74 percent. Consequently, the ALJ's finding is affirmed for the foregoing reasons.

It must be noted that during the time periods that claimant returned to work for respondent and then worked for Blue Sky and Overhead Door his wage loss was clearly less than 100 percent. And because the wage loss portion of the work disability percentage changes, as claimant's wage loss changed, the percentage of work disability varies. Simply stated, after every change in the percentage of disability, a new calculation is required to determine if there are additional disability weeks payable. If so, the claimant is entitled to payment of those additional disability weeks until fully paid or modified by a later change in the percentage of disability. This calculation method requires that for each change in the percentage of disability, the award is calculated as if the new percentage was the original award, thereafter the number of disability weeks is reduced by the prior permanent partial disability weeks already paid or due.

But the weekly amount of benefit does not change whether the benefits are for work disability or functional impairment, instead when the injured worker's status changes due to changes in the work disability percentage or from work disability to functional impairment the only change under the current statute is the length of time the employee is entitled to receive benefits. As noted the claimant's work disability changes several times but due to the accelerated pay out formula and because the compensation rate does not change, it makes no difference in the calculation of this award or in the final amount due, therefore, this award simply uses the final percentage of permanent partial general disability to compute the total number of weeks of permanent partial disability compensation.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated December 8, 2008, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant  
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge